IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1254 OF 2004

Ramesh Singh,)
an Indian Inhabitant,)
residing at C-45, Sector 4 Airoli,)
Navi Mumbai - 400 708.).. Petitioner
(Friend of the Detenu)

Vs.

1. The State of Maharashtra,)
Through the Secretary to the)
Govt.of Maharashtra,)
Home Department, Mantralaya,)
Mumbai - 400 032.)

2. Neela Satyanarayan,)
The Principal Secretary)
(Appeals and SEcurity) to the)
Government of Maharashtra,)
Home Department and Detaining)
Authority, Mantralaya,)
Mumbai - 400 032.)

3. The Superintendent of Prison,)
The Mumbai Central Prison,)
Arthur Road, Mumbai.)

4. The Superintendent of Prison,)
Nasik Road Central Prison,)
Nasik.)..Respondents

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Shri Maqsood Khan for the petitioner.

Shri D.S.Mhaispurkar, APP for the respondents.

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CORAM : R.M.S.KHANDEPARKAR &
P.V.KAKADE, JJ.

DATED : 10th February, 2005.

ORAL JUDGMENT : (Per R.M.S.Khandeparkar, J)

1. The petitioner challenges the order of detention dated 3rd October, 2003 issued under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, hereinafter referred to as "COFEPOSA".

2. The order of detention was issued on 3rd October, 2003 and was served on 8th May, 2004. The Advisory Board’s meeting was held on 11th June, 2004. The present petition was filed on 28th June, 2004. Meanwhile, the detention order of the same date issued against the co-detenu by name Rajendra Tripathi was revoked on 4th December, 2003 pursuant to the representation made by the said co-detenu through his lawyer on 27th November, 2003.

3. The petitioner challenges the detention order on four grounds. Firstly, consequent to the revocation of the detention order against the co-detenu whose role, as revealed from the grounds in support of the order, being disclosed as constituting the activities of abating the smuggling of the goods, which is not different from the one disclosed in relation to the detenu in this case, the detention order against the detenu therefore stands vitiated. Secondly, the State Government was under the

obligation to forward the order of revocation of the co-detenu along with the representation made by him to the Advisory Board before consideration of the case of the detenu by the Advisory Board, as having failed to do so, the continued detention of the detenu is bad in law. Thirdly, in spite of the repeated requests for copies of the representation by the co-detenu Rajendra Tripathi and order of revocation of his detention, the same have not been supplied to the detenu and thereby the detenu has been denied of fair opportunity to make effective representation in exercise of his right assured under Article 22(5) of the Constitution of India. Fourthly that the decision on the consideration of the representation by the petitioner to the State Government has not been communicated to the detenu. Though the challenge to the impugned order is on the four grounds, it is not necessary to deal with all the four grounds and suffice to refer to only one ground which relates to the failure on the part of the respondents to place before the Advisory Board, the copy of the representation by the co-detenu and that of the order of revocation of his detention before consideration of the case of the detenu by the Advisory Board.

4. While elaborating the contention in relation

to the grounds of challenge under consideration, the learned Advocate appearing for the petitioner submitted that the order of detention which was issued against the co-detenu Rajendra Tripathi having been revoked on 4th December, 2003 pursuant to the representation made by him through his Advocate, it was incumbent upon the State Government and the detaining authority to place before the Advisory board the revocation order of the co-detenu Rajendra Tripathi along with the reasons recorded by the State Government for revocation of the order of detention of the co-detenu Rajendra Tripathi so as to enable the Advisory Board to consider the case of the petitioner in proper perspective before giving its opinion in the matter as regards the detention of the detenu. It was his further contention that the detenu had neither knowledge nor opportunity to have the representation of the co-detenu being made available on record, alongwith the order of revocation of the order of detention against the said co-detenu by the respondents and the grounds on which the said order of revocation was passed, and therefore, it was absolutely necessary for the respondents to take appropriate steps to make all those documents available before the Advisory Board on or before 6th June, 2004 when the Advisory Board had met to consider

the case in relation to the detention of the present detenu. Having not done so, the respondents have denied the fair opportunity to the detenu to make effective representation against his detention, and it is more so in view of the failure on the part of the respondents to forward copies of the grounds on which the order of detention of the co-detenu has been revoked to the petitioner inspite of the fact that the grounds in support of the orders passed against both the detenus disclosed not only similar role being played by both of them but also the alleged acts of abatement of smuggling having been done in connivance with each other and further that the activities of the present detenu having been disclosed either at the instance of or under the instructions from the other co-detenus including Rajendra Tripathi.

5. The learned APP, on the other hand, has submitted that considering the role of the detenu that he was the Proprietor of M/s. United Export India Limited and about his involvement in the earlier activities and about the likelihood of his indulging in similar activities in future, mere revocation of the order of detention against the co-detenu will not enure to the benefit of the present detenu, and therefore, non production of such documents before the

Advisory Board would not be fatal nor it would amount to denial of an opportunity to the detenu to make effective representation in exercise of his right under Article 22(5) of the Constitution of India. It is his contention that the documents in question were not material for the purpose of consideration of the case of the detenu by the Advisory Board and being so, it was not necessary to produce those documents before the Advisory Board in its meeting in relation to the petitioner's case. In any case, it is the contention of the learned APP that nothing prevented the detenu from bringing the fact about the revocation of the order of detention against the co-detenu to the notice of the Advisory Board at the time he was heard before it, and failure in that regard cannot enure to the benefit of the detenu to contend that his continued detention to be illegal. It is the contention on behalf of the respondents that the activities by the detenu, apart from his activities in connivance with each other, the present detenu disclosed his active participation in abating the smuggling by allowing the name of his company to be used for fraudulent exports. Reliance is also placed by the learned APP in the decision of the Division Bench of this Court in the matter of **Kirti Kumar Narulla v. State of Maharashtra & Ors.,** reported in 2004(3)Mh.L.J. 505 to contend

that it was not obligatory upon the respondents to furnish copies of the order of revocation of detention of the co-detenu and the grounds in support thereto to the detenu.

6. Perusal of the order of detention and the grounds in support of the order disclose that the detaining authority had arrived at the satisfaction about the likelihood of the detenu indulging in abatement of smuggling of the goods, on the basis of the materials which disclosed that the exports were being made in the name of the companies like Sudha Fashions, Surya Jaipur Rugs, Sterling Enterprises, United Exports and were being stage managed by Ramji Mishra and the arrangements for the exports were made by the detenu along with Subhash Dubey and Rajendra Tripathi. In fact the detenu had allowed the use of his company M/s.United Exports for monetary consideration to Ramji Mishra with full knowledge of what was being attempted to be exported in the name of the detenu’s firm and that undue benefits would flow from the Government Exchequer to the syndicate which included the detenu as well as Rajendra Tripathi. The fact that the goods and their packing pertaining to the so-called different exporters were similar in nature and that the goods the exporters had stuffed

together in a container could not be segregated, established the fact that the fraudulent exports in respect of the said firms were perpetrated by the persons of a common syndicate. These findings by the detaining authority obviously disclose that the detenu along with Subhash Dubey, Rajendra Tripathi and Ramji Mishra, forming a common syndicate, were involved in the alleged activities of fraudulent exports. Undoubtedly, the detenu had allowed the use of his company M/s.United Exports for the purpose of such exports for monetary consideration. At the same time, however, the grounds also disclose that the documentations in relation to such exports were prepared and signed by the detenu as per the instructions of Subhash Dubey and the said Rajendra Tripathi. The grounds also disclose that the detenu had been doing the clearing business in the same manner like Tripathi. The grounds also disclose that Tripathi was to benefit certain percentage of drawback amount along with Subhash Dubey so also the detenu for allowing his company’s name for the purpose of exports. The grounds apparently disclose that the alleged activities were in the nature of exporting the goods by inflating the prices and thereby enjoying high drawback facilities defrauding the public exchequer to that extent, and these activities were

carried out by all these persons viz. the detenu, Rajendra Tripathi, Subhash Dubey, Ramji Mishra, etc. being the members of a syndicate. Though some of the acts have been shown to be attributable independently to each of the persons of the syndicate, at the same time, those acts were found to be a forming part of activities for availing drawback facility by illegal method and means. Being so, the contention that the role of the detenu is totally independent of the role of Rajendra Tripathi, co-detenu, and that therefore, revocation of the order of detention of the co-detenu Rajendra Tripathi cannot enure to the benefit of the detenu is totally devoid of substance. The said argument on behalf of the respondents does not find any support from the grounds for issuance of order of detention against both the detenus. In view of the revocation of the order of detention of the co-detenu, the explanation for the continued detention of the detenu is thoroughly unconvincing. Apart from contending that the role of the detenu would not warrant similar treatment as given to his co-detenu, the respondents have not disclosed the reasons for revocation of the order of detention of the co-detenu. It is further pertinent to note that the order of detention issued against Rajendra Tripathi was revoked on 4th December, 2003 much prior to the date of giving

effect to the order of detention issued against the detenu who was taken into custody only on 8th May, 2004, pursuant to the order dated 3rd October, 2003. Undoubtedly, the contention is that the detenu was absconding for the said period, that is totally a different issue. But the fact remains that on the day when the order against the detenu was given effect to, the order of detention issued against the co-detenu had already been revoked.

7. It is undisputed fact that the detenu had requested for the copies of the representation made by the detenu and the order passed thereon including the reasons for revocation of the order of detention against the co-detenu, however, the same have not been furnished to the detenu. Whether the detenu, as a matter of right, was entitled to the copies or not is a different issue which is not relevant for the decision in the present case. The fact remains that the detenu was not in possession of those documents at the time when his case was taken up for consideration by the Advisory Board on 11th June, 2004. At the same time, those documents were certainly available with the respondents. Considering the fact that the role of the present detenu was not totally an independent of the role played by the said co-detenu Rajendra

Tripathi in the activities of abetting the smuggling, as revealed from the grounds of detention order, and that the activities of the detenu were, as a member of the syndicate to which the co-detenu Tripathi also belonged, the learned Advocate for the petitioner is justified in contending that it was absolutely necessary for the respondents to place those documents before the Advisory Board at the time when the case of the detenu was considered.

8. Section 8 of COFEPOSA deals with the subject of Advisory Board, its meeting and its report, and in particular, clause (c) thereof provides that the Advisory Board to which a reference is made under clause (b) shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit its report. This provision obviously discloses that the concerned

authority have to place before the Advisory Board all the relevant materials in relation to the case of the detenu under consideration before the Advisory Board and that the Advisory Board is fully empowered to call for further information if it deems necessary. Once it is not in dispute that the detenu was not in possession of the documents relating to the representation by the co-detenu, the order of revocation of the detention of the co-detenu and the reasons for such revocation, and in the facts stated above, it was but obvious that those documents were material for consideration of the case of the detenu and the same were required to be placed before the Advisory Board. Once it is apparent from the grounds that Rajendra Tripathi, co-detenu, and the detenu had conducted their activities, as forming members of the same syndicate, irrespective of the independent additional activities carried out by each of them, certainly the reasons for revocation of the order of detention of the co-detenu Rajendra Tripathi were relevant for consideration by a Board. Undoubtedly, the powers of the Advisory Board are in the form of review of the order passed by the detaining authority. Being so, the Advisory Board is independently entitled to re-assess all the materials considered by the detaining authority as well as which might have come

into existence even thereafter and being relevant for consideration as to whether the continued detention to be valid and/or necessary. Any failure on the part of the respondents to bring such material documents before the Advisory Board would virtually amount to a denial of fair opportunity to the detenu to have his case considered by the Advisory Board in a fair and just manner, and on appreciation of all the materials in proper perspective by the Advisory Board. The said failure would result in denial of right to the detenu which is otherwise assured to him under Article 22(5) of the Constitution of India.

9. The decision of Division Bench in **Kirti Kumar Narulla's case (supra)** is to the effect that the detaining authority has no obligation to furnish copies to the detenu in relation to the documents placed before the Advisory Board while dealing with the scope of Article 22(5) of the Constitution of India. That does not lead to conclusion that the authority will be entitled to withhold the documents from the Advisory Board irrespective of the fact that such documents are relevant and material for the purpose of consideration of the case of the detenu by the Advisory Board. A document which discloses the reasons for revocation of the order of detention of

the co-detenu, who was apparently ordered to be detained on the ground that he was a member of syndicate to which the detenu also belonged, it can hardly be said that such a document is irrelevant or immaterial for the purpose of consideration of the case of the detenu by the Advisory Board. Hence, the decision in **Kirti Kumar Naruallaʼs case (supra)** is of no assistance to the respondents to justify their action regarding failure on their part to place the said documents before the Advisory Board.

10. For the reasons stated above, therefore, the opinion given by the Advisory Board would stand vitiated on account of failure on the part of the respondents to place before it the relevant documents at the time of consideration of the case of the present detenu, and on that count itself, the continued detention of the detenu would be illegal.

11. Considering the view that we are taking in relation to the ground regarding failure on the part of the respondents to place the relevant documents before the Advisory Board, it is not necessary to deal with the other grounds of challenge raised by the petitioner in the case in hand.

12. In the result, the Petition succeeds. The continued detention of the detenu Dilip Kumar Mandal is held to be illegal. The Respondents are directed to release the detenu Shri Dilip Kumar Mandal forthwith unless required in any other matter. The rule is made absolute accordingly with no order as to costs.

(R.M.S.Khandeparkar, J)

(P.V.Kakade, J)